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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1396

MICHELIN TIRE CORPORATION,
Petitioner,

-vs-

W. L. WAGES, TAX COMMISSIONER, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

INTEREST OF THE STATE OF GEORGIA

In the first case dealing with the Import-Export Clause of the United States Constitution, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), Chief Justice Marshall recognized that the states have the right, inherent in sovereignty, to tax property within the state. The ad valorem tax levied against Michelin in this case was levied by Gwinnett County pursuant to the authority delegated to the County by the State of Georgia, and a portion of the revenues collected by the County represented a state levy which was required to be remitted by the County to the State of Georgia. See GA. CONST. art. VII, § 4, par. 1; Ga. Code §§ 92-3702, 5703, 5704 (1933), as amended. Because the Import-Export Clause is a limitation on the scope of the State's power to tax property within the State, it is in the interest of the State to insure that its power to tax is not unduly limited, and in the instant case the State of Georgia stands to lose specific revenues if the tax under consideration is not upheld.

STATEMENT OF THE CASE

The facts of this case have been set forth in accurate detail by the Supreme Court of Georgia in its opinion reported at 233 Ga. 712, 214 S.E.2d 349

(1975), and their amplification is not necessary in this amicus brief.

SUMMARY OF ARGUMENT

Prior to the time of taxation of Michelin's tires and tubes, Michelin had completed its activity as an importer and had begun its business activities as a wholesaler. The process of importation was completed, and the imported items ceased to be imports because whatever is held in this case to be the "original package", whether the sea vans or the bulk shipment itself, it was broken and the items became a part of the mass of taxable property located in Gwinnett County.

At the time of taxation Michelin was maintaining the tires, commingled with other imported tires, in the warehouse out of which it was conducting a wholesale business. Both Michelin and the tires at that point were enjoying the benefits and protections provided by Gwinnett County and the State of Georgia, and the use for which the items had been imported had begun. In such a case the Import-Export Clause was never intended to and does not prohibit a nondiscriminatory tax by the State to recoup Michelin's fair share of the costs of providing the services and protections enjoyed by Michelin and the imported items. On the facts of this case the balance between the State's inherent

power of taxation and the prohibition of the Import-Export Clause weighs out in favor of taxation.

ARGUMENT

A. TAXATION OF THE TIRES IN THIS CASE IS CONSISTENT WITH EACH OF THE TESTS WHICH HAS DEVELOPED UNDER THE IMPORT-EXPORT CLAUSE.

Since the landmark case of Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827), the courts have repeatedly been faced with the problem in particular fact situations of balancing the Import-Export Clause 1/ prohibition against state and local taxation with the states' inherent and reserved 2/ powers of taxation and regulation. See generally The License Cases, 46 U.S. (5 How.) 504 (1847).3/

1/ U.S. CONST. art. I, § 10, cl. 2.

2/ See U.S. CONST. amend. X.

3/ Wherein Justice Daniel in his concurring opinion stated:

> "Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation . . . ." 46 U.S. (5 How.) at 613.

In attempting to resolve the practical problem of where to draw the line in a given case in the balancing of the state's power with the Clause's prohibition, the courts have developed several tests for determining when imported articles cease to be imports.

These tests are actually nothing more than paraphrases of the Import-Export Clause, embodied in workable principles which are capable of application to specific fact situations. The classic test of course is what has come to be known as the original package doctrine of Brown v. Maryland. However, that case actually set forth more than one principle applicable to the question of when an import ceases to be a nontaxable import, and these principles have been embellished, modified and extended by cases involving factual situations different from that before the Court in Brown v. Maryland. As will be hereinafter shown, under each of the primary tests which have been employed by the courts, the taxation in this case of Michelin's tires was proper.

In addition to these tests, and as an essential ingredient of each one, the purpose of the Import-Export Clause, along with the spirit of the provision, must be kept in mind. As will be discussed hereinafter, taxation of the tires in the instant case was not only proper under

the various tests and principles developed in the case law, but it is consistent with the spirit and purpose of the Clause. That this is true is most strongly evidenced by the fact that the time of taxation in this case came after Michelin had committed the tires to the purpose for which they were imported and had begun enjoying the benefits and protections provided by the taxing authority in the same manner as other wholesalers, after having broken the bulk of the shipments and having sorted and arranged the tires by size and style.

B. THE TIRES WERE COMMINGLED WITH THE COMMON MASS OF GOODS ALREADY IN THE COUNTRY AND WERE IRREVOCABLY COMMITTED TO THE USE FOR WHICH THEY WERE IMPORTED, SO THAT MICHELIN IS PROPERLY SUBJECT TO THE PROPERTY TAX IN THE SAME MANNER AS OTHER WHOLESALERS.

1. The immunity of imported goods from state and local taxation survives only as long as the goods are kept separate from the common mass of goods already in the country.

One of the principles enunciated by Chief Justice Marshall in Brown v. Maryland was that imported articles lose their immunity from taxation when they become "incorporated and mixed up with the mass of property in the country". 25 U.S. (12 Wheat.) at 441-42. This principle has been applied in various ways by this Court in later decisions. One of the cases most analogous to the instant one is May v. New Orleans, 178 U.S. 496 (1900).

In May v. New Orleans the question was whether a large container of individually wrapped or packaged items was the original package or whether each

individually wrapped item was its own original package. The importer argued that the individually wrapped items were immune from taxation as long as they remained in the form in which they were when placed in the larger case by the European manufacturer or packer. The Court rejected this argument almost out of hand, because such a construction would allow foreign manufacturers to compete with local dealers without any liability whatsoever to state or local governments, by doing no more than separately wrapping each item and then putting them all together in one box. In holding that the larger container was the original package, the Court found that the goods had been so acted upon by the importer that they ceased to be imports and became part of the mass of the property of the state subject to local taxation not only when the goods were placed in the hands of agents for sale, but also when the importer opened the outside box in which his separately wrapped parcels had been imported and then sold or offered to sell the separate parcels. Thus when the shipping case was opened for the sale or delivery of the separate parcels contained in it, each of the parcels lost its distinctive character as an import and became a part of the common mass of goods situated within the taxing jurisdiction,

> "the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade and were opened and the separate packages therein exposed or offered for sale...." 178 U.S. at 510 (emphasis added).

In the instant case the tires were imported in bulk in sea vans.4/ (A. 31, 32) Whether, as will be discussed hereinafter, the sea vans, or the bulk of the shipment, is regarded as the original package, the tires became a part of the common mass of property in Gwinnett County, prior to taxation, because Michelin not only removed them from the sea vans, but sorted and separated them by size and style, and commingled them in its warehouse with other imported tires. (A. 34-35, 49, 50-52, 56-57) Under the test set forth in May v. New Orleans, at the moment of opening the van at the destination of the Michelin warehouse and exposing the individual tires for the purpose of trade, the tires became part of the taxable mass of property in Gwinnett County.

Petitioner's argument in the instant case that each tire is its own

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4/ See note 7, infra.

package is similar to the argument of the importer in May v. New Orleans that each individual parcel within the larger shipment was the package which remained free from taxation.5/ However, the rationale of Michelin's argument is just as fallacious as that of the importer

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5/ Michelin's additional argument on the fact of each tire being separately identifiable by virtue of a serial number has already been rejected by at least one court, Michelin Tire Corp. v. Board of County Comm'rs, cited in text at p.12, infra. But this argument is without merit anyway because probably most of the items imported today have identifying serial or code numbers whether they are shipped as individual items or in packages of a number of items. There is nothing in the record of this case to indicate that the serial numbers affected the import process in any way, e.g. bills of lading on specific tires. Compare E. J. Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P.2d 804, 808 (1947), cert. denied, 332 U.S. 766 (1947), rejecting a similar argument in regard to imported planks (see discussion of this case in text at 28, infra).

in May v. New Orleans, because if each tire does not become a part of the mass of the property of this country upon the breaking of the bulk (as did the smaller parcels in May v. New Orleans), then the tires would arguably never become subject to state and local taxation in the hands of an importer-distributor, even though other distributors were liable for the tax. See May v. New Orleans at 507-08. This subverts the purpose of the Import-Export Clause, which both Brown v. Maryland and May v. New Orleans recognized was to authorize immunity to imported goods only as long as they are kept separate from the mass of property already in the country.6/

The result demanded by May v. New Orleans is strengthened by the analogous cases involving imports for use in manufacturing as opposed to imports for resale. In particular, see Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 538 (1958), affirming the holding of the Supreme Court of Ohio that the protection of the Import-Export Clause does not extend to iron ore after it has

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6/ See Brown v. Maryland, 25 U.S. (12 Wheat.) at 443 ("the tax [may find] the article already incorporated with the mass of property by the act of the importer"); May v. New Orleans, 178 U.S. at 507.

been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place. Michelin's activities were similar in that the tires are commingled with other tires imported at a different time, and tires from the commingled mass of imports in the warehouse are removed for use in filling orders of retail dealers. (A. 56-57, 51) See also Michelin Tire Corp. v. Board of County Comm'rs, District Court of Johnson County, Kansas, Cases Nos. 54594, 56432, 58006, 59905, July 1, 1975, opinion reproduced in Appendix hereto.

2. The tires became taxable after their removal from the sea vans, sorting, and commingling in the warehouse, because there was an irrevocable commitment of the tires to the use for which they were imported, which was use in Michelin's wholesale business.

Another principle enunciated in Brown v. Maryland is that immunity ceases when the importer mixes the goods with the general property of the state by breaking up his packages and travelling with them as an itinerant peddler. In such an instance, the Court held, he

has used the privilege he purchased (by paying the federal import duty), and the state may treat the goods as it finds them. 25 U.S. (12 Wheat.) at 443. The Court has elaborated upon this principle in later cases dealing with imports for use in manufacturing.

In Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), in which the question was whether hemp imported for use in manufacturing was taxable while in storage pending use, the Court held that an import has become a part of the mass of taxable property within a state when removed from the package in which it was imported or when used for the purpose for which it was imported. 324 U.S. at 665, 668.

Similarly, in Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), the Court, after reviewing Brown v. Maryland and Hooven & Allison Co. v. Evatt, supra, held that imported iron ore became so mixed in with the mass of property already in the country as to lose its character as an import when it was irrevocably committed to the manufacturing process for which it was imported, by being stored with other similar imported goods pending use in the actual manufacturing process. Thus, this case added the additional principle that imported goods lose their immunity

from taxation at the moment they are irrevocably committed to the purpose for which they were imported.

Even though Hooven & Allison Co. v. Evatt and Youngstown Sheet & Tube Co. v. Bowers involve manufacturing use, rather than resale of the goods imported, the principles set forth in these cases are applicable to an import for resale case, because they are derived from the principles originally set forth in Brown v. Maryland. See Hooven & Allison Co. v. Evatt, 324 U.S. at 665; Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. at 543-45; Brown v. Maryland, 25 U.S. (12 Wheat.) at 443; May v. New Orleans, 178 U.S. at 508. In any event, the analogy is a good one when applied to the facts of the instant case.

The record shows that Michelin imports the tires and tubes through a broker. (A. 42-43, 50) The goods, which are packed and sealed at the factory in a sea van,7/ arrive at the Michelin warehouse some 7 to 8 days

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7/ A relatively small percentage of the tires from Canada are loaded into trailer-type containers. However, as a practical matter the principles discussed in this brief which apply to the sea vans also appear applicable to Michelin's use of the other shipping units. (see A. 32-33, 34, 43-44, 49, 52)

after arriving in this country.8/ (A. 45) At the warehouse the sea vans are opened, the tires are then sorted by size and style, loaded onto pallets, and the pallets are commingled with other tires imported from the same and at least one other country which are already in the warehouse. (A. 46, 56-57, 50) Not all tires from each country are stored in the Gwinnett County warehouse; some are stored in a different warehouse in another county. (A. 52) It thus becomes clear that at this point the tires are irrevocably committed for use in Michelin's wholesale business activities and the use for which they are imported is actually underway, because the tires are randomly stored with other imported tires for exposure to use and actual use in filling purchase orders in Michelin's wholesale business. As the orders are taken, they are filled at random from the tires in the warehouse, without regard to any shipment (A. 56-57, 51), and without regard to quantities of tires equivalent to the quantity imported on any particular sea van (A. 60). After an order is filled, the wholesale business proceeds either

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8/ The time lag may be somewhat different in some shipments from Canada. (A. 52-53)

through Michelin's shipping the tires to the retail dealer (A. 51), or by the dealers picking up the tires from the warehouse, in quantities as small as 4 tires (A. 51). Billing for the tires then follows delivery or pickup. (A. 51)

These activities of Michelin are almost identical to those of an importer in a case recently before the Supreme Court of California. In Volkswagen Pacific, Inc. v. City of Los Angeles, 101 Cal. Rptr. 869, 496 P.2d 1237 (1972), the taxpayer imported automobiles and automobile parts in sea vans, which were delivered to the taxpayer's warehouse; at the warehouse the items, some unpackaged, were removed from the sea vans and then distributed to local dealers. The court held that once the items, both packaged and unpackaged, were removed from the sea vans by the taxpayer with the intent and effect of acting as a wholesaler in the items, the items lost their immunity. 496 P.2d at 1243. See also American Mannex Corp. v. Cronvich, 251 La. 1014, 207 So.2d 778, 782 (1968).

Therefore, under the holdings of Hooven & Allison Co. v. Evatt, supra, and Youngstown Sheet & Tube Co. v. Bowers, supra, and May v. New Orleans, supra, Michelin's tires became a part of the mass of property already in the country and lost their character as imports at the time of the removal of the

tires from the sea vans, when they were sorted, stored, and commingled for use with other tires in Michelin's wholesale business activities. This is the use for which they were imported and at this time they became irrevocably committed to this use.9/ Under the holdings of these cases and Volkswagen Pacific, Inc. v. City of Los Angeles, supra, the tires became part of the general mass of property which Brown v. Maryland recognized is subject to taxation. See Brown v. Maryland, supra at 441, 443.

9/ The use in the wholesale business consisted of both availability to satisfy future purchase orders by dealers and the actual use of filling current and future orders by making sales to the dealers and either delivering the tires to the dealer or keeping the tires available at the warehouse for pickup by the dealer-purchaser.

C. BOTH THE ORIGINAL PACKAGE AND THE AGGREGATE OF THE BULK TIRE SHIPMENT WERE BROKEN SO AS TO RELIEVE THE TIRES OF THEIR IMMUNITY FROM TAXATION.

1. The sea van was the original package.

In enunciating the now famous original package doctrine in Brown v. Maryland, the Court stated that the prohibition of the Import-Export Clause continues in effect on property of the importer remaining in his warehouse "in the original form or package in which it was imported". 25 U.S. (12 Wheat.) at 442. In the instant case, the original package is the sea van in which the tires were stored, shipped and delivered.

In May v. New Orleans, supra, the Court held that:

> "[T]he 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property subject to taxation by the State as other like property situated within its

> limits." 178 U.S. at 508-09 (emphasis added).

Thus the original package is the container in which goods are shipped and delivered, which is the sea van in the instant case. The sea vans were packed with the tires and sealed at the foreign factory (A. 43), and they remained sealed, except for inspection by U.S. Customs Officials, from the time they were packed at the factory until unloaded at the Michelin warehouse. (A. 44)

Only a few cases have been found which have considered the precise question of whether or not a sea van is the original package for purposes of the Import-Export Clause, and the cases are split; but a finding that the sea van as used by Michelin in this case is the original package would be more consistent with May v. New Orleans than a holding to the contrary.

In Volkswagen Pacific, Inc. v. City of Los Angeles, 101 Cal. Rptr. 869, 496 P.2d 1237 (1972), discussed supra at p. 16, the court held that sea vans in which both packaged and unpackaged automobile parts were shipped were the original package. 496 P.2d at 1243. The facts showed that once the individual articles were removed from the sea van, Volkswagen distributed the articles to

local dealers, and the items became part of the mass of property in the country.

The contrary result was reached in Michigan State Tax Comm'n v. Garment Corp. of America, 32 Mich. App. 715, 189 N.W.2d 72 (1971). In that case the court held that the sea vans, which were used to ship industrial garments packed into heavy-duty cardboard cases sealed with heavy sealing tape and reinforced with heavy steel bands or straps, were not the original package, because the sea vans were found to be no different than over the road transportation vehicles. 189 N.W.2d at 74. However, that case is distinguishable from the instant case, because the garments had been adequately packed so as to be capable of shipment in the packages which were loaded in the sea vans. The tires in the instant case were not so packed. In addition, the manufacturer of the garments made the election to pack the garments in the reinforced cardboard cases, and it was the carrier hired to transport the packages who availed itself of the use of sea vans. In the instant case the sea vans are packed with the tires by the foreign factory and sealed at the factory as its intended shipping packages. Therefore, the garment corporation case is not contra to the Volkswagen case when applied to the facts of the instant case.

A third case, the most recent decision found on this question, falls between the holdings of the two foregoing cases and sets forth what is perhaps the best rule in cases involving sea vans. In Singer Co. v. County of Kings, 121 Cal. Rptr. 398, ____P.2d____ (Ct. App. 1975) the imported articles were various items of personal property which were packed at the factory in heavy-duty cardboard boxes with protective liners and packing and sealed with glue and heavy sealing tape or staples and then, upon occasion, transported by sea van. The court held that whether a sea van or cargo container constitutes an original package or not is a fact question to be answered under the circumstances of each case, 121 Cal. Rptr. at 404, and found on the facts of the case before it that the sea vans had not been employed as the original package. However, under this question of fact test, again it is clear in the instant case that the foreign manufacturer did intend to and did use the sea van containers as the original package for shipment. At no time were the tires removed from the sea vans and reloaded into other containers or vehicles from the time they left the factory until the time of delivery to Michelin's warehouse. (A. 43-44)

The ruling of the Singer Co. v. County of Kings case, supra, that whether or not a sea van container is the original package is a question of fact is

urged upon the Court as the proper view. At the time Brown v. Maryland was decided, and even as late as the first half of this century, sea vans and cargo containers such as the ones used in the instant case did not exist. Today these containers, which can be used in different ways, are revolutionizing the area of importing and exporting goods.10/ The actual manner in which these containers are used in a given case should be determinative, so that when the shipper or manufacturer employs the container to ship goods which are not capable of or are not otherwise packaged to be capable of safe overseas shipment, the container should be treated as the original package.

There is additional support for this position in a Second Circuit case involving a problem with sea vans and shipping containers which is analogous to the problem before this Court. In Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973) the court was faced with the question of whether or not a sea van container was the shipping

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10/ See generally De Orchis, The Container and the Package Limitation-The Search for Predictability, 5 J. MAR. LAW & COMM. 251 (1973-74).

"package" for purposes of carrier liability limitation under 46 U.S.C. § 1304 (5)(1970).11/ After noting the new economic and transportation developments in the use of these containers, the court held that a container used to ship adding machines, which had been packed in light cardboard cartons only, and which prior to the advent of the container had been shipped in wooden cases or crates, was a "package" within the meaning of the federal statute. The court employed a factual test, looking at whether or not the individual units shipped were functional or usable for overseas shipment. The cardboard cartons were found not to be functionable, and thus the shipping container was found to be, in effect, a substitute for the wooden crates which had formerly been used in shipping the adding machines. 483 F.2d at 649.

In light of the development of the use of the sea van container in the

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11/ This section of The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, et seq., provides, in part: "Neither the carrier nor the ship shall be...liable for any loss...exceeding $500 per package...."

modern import-export industry, the Court is urged to follow the rationale of May v. New Orleans, supra, and the other cases adopting a factual analysis approach to applying the original package doctrine today. The original package doctrine itself is merely a tool to aid the courts in determining when as a matter of law an article ceases to be an import,12/ and this determination necessarily requires scrutiny of the particular facts involved. In the instant case, the sea van is the original package, because it was at all times intended to be and was in fact used as a substitute for a packing crate, wrapper or other means of packaging the individual tires for the purpose of shipment and delivery from the manufacturer to Michelin's warehouse.

12/ See Baldwin v. Seelig, 294 U.S. 511 (1935).

2. Even if the sea van is not viewed as the original package, nevertheless, under the majority and better view the tires lost their immunity as imports when one or more of them were removed from the bulk shipment at Michelin's warehouse.

Just as in the cases involving sea vans, there is a split among the few cases which have considered the taxability of non-packaged imported items upon the breaking of the bulk of the shipment. The majority and better view is that where goods are shipped in the aggregate or in bulk without individual packaging, when one or more of the items are removed or separated from the bulk shipment, the goods become a part of the common mass of goods in the country and subject to taxation. This rule is applicable in the instant case, and the taxability of Michelin's tires is fortified even more by coupling this rule with the principles of Youngstown Sheet & Tube Co. v. Bowers, supra, and Hooven & Allison Co. v. Evatt, supra, discussed above, which authorize taxation when the imported items are used for or irrevocably committed to the purpose for which they were imported.

The essence of the cases comprising the better view is that the underlying

principle of Brown v. Maryland which retains validity in contemporary transactions and which will continue to be valid in the future, is that imported articles remain imports only so long as the original commercial unit of importation is not broken. Thus, when items are not shipped individually but as a part of an aggregate of other individual items, such as in the case of lumber, pipes, etc. the point in time at which the items cease to be imports is the time at which the bulk is broken by the importer. There is authority for this view not only in Brown v. Maryland but also in later cases decided by this Court.

In The License Cases, 46 U.S. (5 How.) 504 (1847) Justice Catron stated that:

> "[W]hen the article passes by sale from the hands of the importer into the hands of another, either for the purposes of resale or of consumption or is divided into smaller quantities, by breaking up the casks, packages, etc., by the importer, the article ceases to be a protected 'import,'...." 48 U.S. at 610 (emphasis added).

See also May v. New Orleans, 178 U.S. at 510.

The majority of the states which have considered this question follow this lead. In Columbus Steel Supply Co. v. Kosydar, 38 Ohio St.2d 258, 313 N.E.2d 389 (1974), it was held that the original package was the commercial unit of importation, or the aggregate shipment of steel pipe in that case. Thus when an individual pipe was separated from the commercial unit, or was sorted or segregated from other items comprising the commercial unit, the original package was broken. 313 N.E.2d at 393. See also Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898), aff'd, 179 U.S. 343 (1900) (an original package may be an "aggregation of goods, put up, in whatever form, covering or receptacle, for transportation, and as a unit transported from one state or nation to another"); Volkswagen Pacific, Inc. v. Los Angeles, supra.

In American Mannex Corp. v. Cronvich, 251 La. 1014, 207 So.2d 778 (1968), it was held that the original package comprised all individual steel oil well casings covered by the bill of lading for each shipment and that when the casings were sorted and stored with other tubing of like dimension and quality in the warehouse they were commingled with the common mass of goods. At that point in time they became irrevocably committed to the purpose for which they were ultimately

destined, sale by American Mannex, so that they lost their immunity and became taxable under the holdings of Youngstown Sheet & Tube Co. v. Bowers, supra, and May v. New Orleans. 207 So.2d at 782.

In the case of E. J. Stanton & Sons v. Los Angeles County, 78 Cal. App. 2d 181, 177 P.2d 804 (1947), involving the importation of lumber for sale at wholesale and retail, the court found that "the conclusion is irresistible" that the unit of importation is the original package. 177 P.2d at 807. The court stated that:

> "A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then...termination of immunity [is compelled]." 177 P.2d at 808.

The court relied upon, inter alia, May v. New Orleans and Brown v. Maryland in finding that the importer had used the privilege he had purchased and had himself mixed the articles with the common mass of property. 177 P.2d at 808-809. For a recent case adopting the majority view on facts actually involving Michelin Tire Corporation, see Michelin Tire Corp. v. Board of County Comm'rs, supra.13/

Even the cases which are ostensibly contrary to the majority view do not require a result in the instant case which would be different from that required by the majority view. In Florida Greenheart Corp. v. Gautier, 172 So.2d 589 (Fla. 1965), cert. denied, 382 U.S. 825 (1965), while the court held in effect that individual pieces of timber were their own original package, the court

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13/ The court held, on facts substantially identical to those of the instant case, that removal of the tires from the sea vans caused the aggregate to be broken and this, coupled with putting the tires to use in the wholesale business caused the tires to lose their identity as imports. See Appendix hereto.

stated that if the evidence had shown that the timber had been "promiscuously mixed" with domestic and other timber, then the timber would have been taxable.14/ 172 So.2d at 592. While in the case of Citroen Cars Corp. v. City of New York, 30 N.Y.2d 300, 283 N.E.2d 758 (1972), the court ruled that certain cars imported for sale at wholesale were immune from taxation, the issues of aggregate shipment and commingling of imported items were not raised and the decision turned on a principle favorable to Respondent in the instant case.15/ In the case of Wilson v. County of Wake, 19 N.C. App.

14/ On the facts it could not be determined how many of the timbers were generally commingled with other shipments for sale to the public and how many were segregated according to existing orders. A strong dissent by two justices thought May v. New Orleans and other authorities required a result contrary to the majority's ruling based on a prior state decision. 172 So.2d at 592-95.

15/ The court adopted the test of Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959) that immunity is lost when the import has been so acted upon as to lose its immunity and found on the facts that immunity was not lost where only temporary, minor changes in the cars had been made to accomplish delivery and to complete the physical integrity of the product. See 283 N.E.2d 762, 759, 761.

536, 199 S.E.2d 665 (1973) the court of appeals expressly rejected the aggregate shipment concept on the facts before it, but the argument was based upon the hold of the ship constituting the original package, not, as in the instant case, on a sea van packed by the manufacturer and both intended to be and actually used as a substitute for a shipping crate.

Therefore, it can be seen that even the cases which seem to reject the view that an aggregate shipment is an original package, are not in conflict with a ruling on the facts of the instant case that the imported tires lost their immunity from taxation before the tax assessment was made. None of Michelin's tires are individually packaged, nor are they packaged in crates or boxes inside the shipping container. They are shipped as a bulk shipment of tires, collectively "packaged" in a containerized sea van. (A. 31) There is absolute continuity from the time of packing at the foreign manufacturer's plant until the time of delivery and breaking of the container at Michelin's warehouse, at which time the tires are sorted and segregated by size and style and commingled with the mass of goods already in the warehouse. (A. 43-44)

Thus it is clear, particularly under the majority and better view which follows the underlying rationale of Brown v.

Maryland, that tax immunity is lost at the time of sorting, segregating and commingling the tires which are removed from the sea van at Michelin's warehouse. As pointed out in American Mannex Corp. v. Cronvich, supra, it becomes all the more clear that the tires lost their immunity upon the breaking of the aggregate shipment, because when the tires were sorted and stored in the warehouse the use for which the importation was made began and the tires were irrevocably committed to exposure and availability for and actual use in Michelin's wholesale business conducted out of its warehouse. See also Hooven & Allison Co. v. Evatt, supra, and Youngstown Sheet & Tube Co. v. Bowers, supra.

Therefore, even if the sea van is not viewed as the original package, the majority and better view among the state cases and the decisions of this Court require the conclusion that the breaking of the aggregate shipment, coupled with Michelin's subsequent use of the tires, terminated the tires' tax immunity.

D. MICHELIN HAS AVAILED ITSELF OF THE BENEFITS AND PROTECTIONS OF THE STATE OF GEORGIA AND GWINNETT COUNTY.

Another principle or test which has emerged in the case law is to determine at what point, after the state has obtained jurisdiction over the article, the importer has begun to avail itself of the benefits and protections provided by the state in such a manner that it is both fair and necessary for the state to exact a return from the importer for services provided. This test balances both the purposes behind the Import-Export Clause and the needs of the states to secure revenues from persons to whom it provides benefits and protections.

The essence of this test was set forth in The License Cases, supra, wherein Justice Daniel in his concurring opinion stated:

> "All property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home." 46 U.S.(5 How.) at 613.

Justice Daniel went on to point out that the power of the federal government to regulate imports and exports must be "expounded in coincidence with a perfect

right in the states to all that they have not delegated;[16/] in coincidence, too, with the possession of every power and right necessary for their existence and preservation. . . ." 43 U.S. (5 How.) at 614. See also the majority opinion written by Chief Justice Taney, 46 U.S. (5 How.) at 576.[17/] Therefore, from the earliest cases seeking to strike the proper balance between granting the tax immunity to imports and allowing the states to exercise their inherent and reserved taxing authority to the fullest extent permissible, this Court has recognized that taxation is justified when the property or the citizen begins to enjoy the benefits and protections of the state government in a capacity other than as an importer.

This principle was also touched upon in May v. New Orleans, supra, wherein the Court stated that imported items lose their immunity at the time the importer has so acted upon them that they have become incorporated or mixed with the general mass of property in the state because:

16/ See U.S.CONST. amend X.

17/ "[A] State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any property of which he is the owner."

> "[T]hey are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate." 178 U.S. at 507-08.

Thus, in the instant case, where Michelin has acted upon the tires through the breaking of the shipment, the sorting and segregating of the tires, the commingling of them with other imports, and the maintaining and employing of them in that phase of its activities which constitutes a wholesale business, Michelin has so acted upon the tires as to avail itself and the tires of the benefits and protections afforded them by the State of Georgia and its governmental subdivision, Gwinnett County.

Among the benefits and protections provided are fire protection, police protection from theft, etc., utilities, roads and highways and other services essential to the conduct of Michelin's business as a wholesale dealer in the tires which have come to rest at its warehouse. The ad valorem property tax, levied at the point in time where Michelin has committed the tires to use and used the tires in its wholesale operation is a justifiable quid pro quo

for these benefits and protections.[18/] These tires which are exposed for sale (A. 51), constitute a portion of the mass of the wealth of the state as much as do similarly situated domestically produced goods. To decide otherwise would require the domestic producer to pay for governmental services and police protection provided to the importer-wholesaler. Such a result is inconsistent with the purposes of the Import-Export Clause, which was meant to prevent discrimination against imported goods, not to authorize discrimination against domestic producers.

18/ See generally Dakin, The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?, 19 LA. L. REV. 747, 753 (1959), citing an unreported state case decided in 1870; Note, State Taxation of Imports --- When Does an Import Cease To Be an Import?, 58 HAR. L. REV. 858, 867 (1945).

E. TAXATION OF THE TIRES IN THIS CASE IS CONSISTENT WITH THE PURPOSES BEHIND THE IMPORT-EXPORT CLAUSE.

As shown in the preceding sections of this brief, the tax imposed on Michelin's tires by Gwinnett County and the State of Georgia satisfies each of the various principles and tests set forth by the courts for determining when such a tax is proper. However, it is helpful also to draw back from the principles and paraphrases and to view the intent, purpose and effect of the Import-Export Clause itself as applied to the factual situation currently before the Court. When this is done, it becomes apparent that the tax imposed upon Michelin at the point in time that it was levied is fully consistent with the Import-Export Clause.

In Brown v. Maryland, the Court concluded that the Import-Export Clause prohibits not just duties on the act of importation, but also duties on the thing imported. Nevertheless, it seems clear that the farther the prohibition is extended beyond the act of importation the more suspect the prohibition becomes. That is, once the act of importation is completed, unless a property tax on the goods imported can be shown to violate some significant purpose behind the Import-Export Clause, such a tax, if otherwise fair and nondiscriminatory, should be upheld.

In The License Cases, supra, Justice Daniel stated in his concurring opinion:

> "So soon as [the goods] are cleared of all control of the government which permits their introduction, and have become the complete and exclusive property of the citizen or resident, they are no longer imports in a political, or fiscal, or common sense. They are like all other property of the citizen, and should be equally the subjects of domestic regulation and taxation, whether owned by an importer or his vendee. . . ." 46 U.S. (5 How.) at 614.

In the instant case, Michelin's tires had passed beyond the control of the federal government which permitted their introduction into the country and had become the complete and exclusive property of Michelin Tire Corporation of Georgia before the time of taxation. (A. 41, 44).

Though the tires were intended for subsequent sale and shipment to or pick up by retail dealers, they were no longer in transit during the period they were stored in the Gwinnett County warehouse. The record on the whole shows that they were stored in the warehouse to be used in filling orders from retail dealers. (See A. 35, 51). None of the shipments were earmarked or

designated for delivery to a particular dealer or to fill a particular order. (A. 28-57, 60). Thus, it was impossible to tell whether any given tire or shipment of tires was used or will ever be used in filling orders, even though they are irrevocably committed to and exposed to such use. In fact, domestic items may be, and have been on occasion, substituted for Michelin's foreign-made products in order to satisfy orders by dealers. (A. 29, 30) Therefore, it cannot logically be said that the import shipments were still in transit to another place in the country after sorting, segregation and commingling with the other tires at the Gwinnett County warehouse.

There is nothing in the record to show that any one tire or shipment of tires could not sit in the warehouse for years before it was used, if at all, to fill an order, because the orders and the tires selected to fill the orders in no way corresponded to shipping van quantities. (See A. 57, 60)

In addition, the evidence indicates that it was a broker who actually imported the tires and brought them into the country for Michelin Tire Corporation. (A. 42-43, 50) This makes it even clearer that Michelin, once it received the tires and sorted them and commingled them in its warehouse with other imports, began engaging in its business as a wholesaler and began enjoying the benefits and protections of Gwinnett County and the State of Georgia in that capacity.

While not directly in point, a recent decision of this Court concerning exports further indicates that in a factual situation similar to the instant one the Import-Export Clause was not intended to prohibit ad valorem taxation. In the case of Kosydar v. National Cash Register Co., 417 U.S. 62 (1974), the Court held that an ad valorem tax on cash registers manufactured in this country and crated and shipped to a warehouse in Ohio to await foreign shipment was proper even though none of the cash registers ever under any circumstances went into the United States domestic market. The facts of that case on exports depict the exact reverse side of the import question involved in the instant case: When the adding machines were assessed they were sitting in NCR's[19/] warehouse awaiting foreign shipment (just as Michelin's tires when assessed were sitting in its warehouse awaiting shipment to or pick up by retail dealers); title and possession were still in NCR (as in the instant case they were in Michelin); no payment had yet been made by the putative purchasers (as none had been by the putative dealers in the instant case); the machines were in the complete control of NCR (as the tires were and are in the complete control of Michelin); there had been no movement of the goods yet in the direction of foreign commerce (as there had been no movement of the tires in this case in the direction of any dealers); and

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19/ National Cash Register Company.

there had been no commencement of the process or procedures of exportation (as there had been no commencement of the process of selling specifically designated tires, i.e., no purchase orders were taken nor bills of lading, etc. prepared nor shipping contracts with carriers entered into to deliver the tires to a dealer). The Court's statement of the purpose of the Import-Export Clause, though made in regard to exports, is also applicable to imports:

> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services." 417 U.S. at 70 (emphasis added).

Thus, the Court held that the mere prospect of export, no matter how certain, does not start the process of exportation.

Similarly, Michelin's prospect of selling each of the tires of each of the shipments imported into this country and of shipping them to dealers, no matter how certain, does not start the process of making such sales nor prolong the process of importation. At the point in time at which the tires were taxed it cannot be said that they were still being imported.

Therefore, on the facts of this case the taxation of Michelin's tires is consistent with the intent, purpose and effect of the Import-Export Clause.

F. TAXATION OF THE TUBES WAS ALSO PROPER IN THIS CASE.

The principles applicable to the tires, as discussed above, are applicable to Michelin's tubes also, even though the tubes were placed in individual boxes inside larger cartons.

The breaking of the sea van and the bulk of the aggregate shipment is what constituted the breaking of the original package. (A. 47, 43-44) See authorities cited in argument C, supra. And, more importantly, Michelin treated the tubes in a manner consistent with its wholesale business, not its business as an importer. The purpose of the importation of the tubes was for use in its wholesale business. Upon the removal of the tubes from the sea vans and storage in the warehouse, even though they remained in smaller boxes, they became irrevocably committed to this use. Michelin enjoyed the benefits and protections of state and local laws just as fully in regard to the tubes as it did in regard to the tires, and, therefore, should be required to reimburse the State for the costs of providing these protections and services.

Even though individual tubes were removed from the full cartons area of the warehouse once their larger carton was broken (A. 35), nevertheless, the

remainder of the tubes had already been commingled with other imported tubes (A. 50, 57). The process of importation had been completed and the tubes were being treated and used in the same manner as domestically produced items stored for use in filling orders in a wholesale business. See Volkswagen Pacific, Inc. v. City of Los Angeles, 101 Cal. Rptr. 869, 496 P.2d 1237, 1243 (1972). See also May v. New Orleans, supra. Therefore, all of the imported tubes were properly subject to taxation in this case.

G. PETITIONER'S ARGUMENTS ARE WITHOUT MERIT.

Michelin's argument that the "original form" doctrine prohibits taxation of its tires because the form of the tires is not changed between the time of delivery of the tires to the warehouse and the time of withdrawing the tires from the warehouse for the filling of purchase orders by dealers is without merit, because the term "original form" as used in Brown v. Maryland in the phrase "original form or package" was not intended to encompass changes in the physical state of the ultimate product, but rather was intended to refer to the shipping state of the imported item. Thus the term "original form" is properly applicable apart from the term "original package" only when used in reference to items incapable of packaging or capable of physical processing, such as ores, oil, etc.20/

The phrase "original form" has no applicability to automobile tires, which are capable of either being wrapped or packaged or shipped in bulk but which in no instance are capable of being physically modified when the purpose of importation is for resale. While the principles set forth in the cases discussed above involving

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20/ See generally Dakin, supra note 18, at 769, and citations therein.

imports for manufacturing are generally applicable to the instant case, nevertheless, to strain the "original form" principle to include automobile tires imported for sale violates not only the Court's intent in Brown v. Maryland but the subsequent application of the term in other decisions.

Michelin's argument that the imported tires are "still in the flow of import distribution" while in Michelin's warehouse is also without merit. In making this argument, Michelin relies upon Youngstown Sheet & Tube Co. v. Bowers, supra, and, inter alia, the Court's statement therein that the imported ores in that case were merely "in transitu". 358 U.S. at 540, n. 6. However, the facts of this case are to the contrary, as discussed in argument E of this brief. The tires came to rest at the warehouse, and could be stored at the warehouse in their commingled condition indefinitely before ever being shipped, if at all, to a dealer who placed an order for tires of a particular size and style. The record is silent on what would happen to tires in the warehouse if there were a model change or a style change; tires of this type might never be sold and shipped to any dealer.

Reliance by Michelin upon the case of Standard-Triumph Motor Company, Inc.

v. City of Houston, 220 F.Supp. 732 (S.D. Tex. 1963), vacated, 347 F.2d 194 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966) is misplaced, because that case dealt with a temporary change in form of imported automobiles in order to accomplish delivery of the cars to the importer's warehouse. 220 F.Supp at 733.

Also, Petitioner's argument that the Import-Export Clause prevents the states from adding a tax to items imported so as to raise the price on the goods once they reach inland states was put to rest as long ago as The License Cases, 46 (5 How.) U.S. 504 (1847), wherein the Court stated in the majority opinion that it was not improper for the laws of a state to, by their effect, "discourage imports, and diminish the price [they] would otherwise bring." 46 U.S. (5 How.) at 577.21/ In addition, this argument is without merit because the rationale behind it would also apply to import duties imposed by the federal government, which are authorized by the Import-Export

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21/ See also the concurring opinion of Justice Woodbury, stating that a state law is not unconstitutional merely because it tends to diminish the consumption of foreign articles, 46 U.S. (5 How.) at 621-22; Note, supra note 18 , at 867.

Clause in order to protect domestic brands from competition by foreign manufacturers.

Therefore, none of Petitioner's arguments are sufficient to rebut the decision by the Georgia Supreme Court that Michelin's tires had lost their immunity from taxation.

CONCLUSION

The long history of cases has established that an importer who is also engaged in selling his imports is conducting two distinct operations. As long as he is acting with or upon the articles as imports, both he and the articles are exempt from taxation. However, as soon as he begins acting with or upon the articles in his other business capacity, the articles become subject to taxation. This is the essence of the ruling of the Georgia Supreme Court in this case, and it is not only consistent with all of the principles expounded in the area by the many cases since Brown v. Maryland, but it fully comports with the spirit and effect of the Import-Export Clause. In this case Michelin was taxed only after it had exposed the imported items to use and had begun using the imported items in its wholesale business, in which it enjoyed the benefits and protections of the State of Georgia and Gwinnett County just as fully as any other wholesaler in the County. Therefore, both the spirit of the Constitution and the facts of this case require that the decision of the Georgia Supreme Court be affirmed as to the tires and modified as to the tubes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Herman Perry Michael, one of the attorneys for the State of Georgia and a member of the bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief For the State of Georgia As Amicus Curiae upon all parties required to be served by mailing copies thereof, first class postage prepaid, to the attorneys of record for Petitioner and Respondents.

This 5th day of September, 1975.

HERMAN PERRY MICHAEL
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APPENDIX

APPENDIX

[Filed in Clerk's Office July 1, 1975.
Hazel J. Mueller, Clerk of the District Court.]

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS

MICHELIN TIRE CORP., *Plaintiff*, vs. BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS, et al., *Defendants.*	CASE NO. 54594 56432 58006 59905 DIVISION NO. IV

MEMORANDUM DECISION

Findings of Fact

1. The plaintiff, Michelin Tire Corporation, is incorporated under the laws of the State of New York and maintains its principal office in Lake Success, New York. Plaintiff at all pertinent times was qualified to do business in Kansas as well as various other states of the United States.

2. The defendants are the governing bodies of all tax units affected by plaintiff's protest of payment of ad valorem taxes and all other governmental units or officers who have any interest in these actions.

3. The Michelin Tire Corporation is plaintiff in:

(a) Case No. 54594 in which, with reference to its assessment on tangible personal property in the total sum of $95,555.00 for the year 1972, admitting the legality of an assessed valuation in the sum of $5,565.00 but contending the remainder of the said

total valuation in the sum of $90,990.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the amount of $9,609.63.

(b) Case No. 56432 in which, with reference to its assessment on tangible personal property in the total sum of $94,465.00 for the year 1973, admitting the legality of an assessed valuation in the sum of $5,000.00 but contending the remainder of the said total valuation in the sum of $89,465.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the sum of $4,28[illegible].94 for the first half of the 1973 taxes.

(c) Case No. 58006 in which, with reference to its assessment on tangible personal property in the total sum of $94,465.00 for the year 1973, admitting the legality of an assessed valuation in the sum of $5,000.00 but contending [1] the remainder of the said total valuation in the sum of $89,465.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the sum of $4,286.94 for the second half of the 1973 taxes.

(d) Case No. 59905 in which, with reference to its assessment on tangible personal property in the total sum of $57,335.00 for the year 1974, admitting the legality of an assessed valuation in the sum of $4,505.00 but contending the remainder of the said total valuation in the sum of $52,830.00 to be illegal and void, plaintiff sues for the refund of taxes paid under protest in the sum of $2,762.56 for the first half of the 1974 taxes.

These actions involve common questions of law and fact and have been consolidated for trial by court order.

K.S.A. 79-201 provides that all personal property in this state, not expressly exempt therefrom, shall be subject to taxation and K.S.A. 79-1439 provides that all tangible personal property subject to general property taxes shall be assessed at 30% of its value.

4. With reference to the tax years involved in Cases numbered 54594, 56432 and 58006, the administrative determination of the County Assessor is that plaintiff's inventory is and was subject to the provisions of K.S.A. 79-1001 et seq., and that had plaintiff correctly reported its personal property inventory in accordance with K.S.A. 79-1001 (c) (b), said defendant would have accepted said renditions. In connection therewith, in the year 1972, 72.5% of the value of plaintiff's inventory in Johnson County, Kansas, was shipped to destinations outside of the State of Kansas, and in 1973, 75.2% of the value of plaintiff's inventory in Johnson County, Kansas, was shipped to destinations outside of the State of Kansas.

Plaintiff's rendition for the 1974 taxes was made in accordance with K.S.A. 79-1001 (c) (b).

5. The nature and character of the business in which plaintiff engages in the State of Kansas is leasing a warehouse for the purpose of maintaining a stock of tires and selling its tires within the said state and generally carrying out its corporate purposes within said state. The nature and kind of business in [2] which plaintiff is engaged in Kansas is that of distributing tires. It is a wholesale and to some extent a retail business. There are between thirty and fifty authorized dealers in the State of Kansas from time to time receiving goods.

6. Plaintiff enters into written dealer-sales agreements with various individuals, partnerships, limited partnerships and corporations whereby the latter become dealers in Michelin products.

(a) Plaintiff agrees to sell to the dealers and the dealers agree to purchase from plaintiff Michelin products offered for sale by plaintiff.

(b) The dealers are required to promote the retail sale of Michelin products and to render service with respect to Michelin products. They must establish and maintain a place of business satisfactory to plaintiff in appearance, size, layout and equipment. They must permit plaintiff to have access to their premises during all business hours. Dealers are required by plaintiff to prominently display Michelin signs and other Michelin product identification in conformity with plaintiff's standards.

(c) They are required at all times to maintain and employ, in connection with their business operations under their dealer-sales agreements, such net working capital and net worth as are required to enable them to perform all of their duties, obligations and responsibilities under such agreement. They are required to maintain accounts and records of their business operations in accordance with accounting methods and standards generally accepted in the retail tire business and must submit to plaintiff financial statements and records as may from time to time be requested by plaintiff. The dealers are required to conduct their businesses in such a manner that will reflect favorable at all times on plaintiff, on Michelin products and on the name and good will thereof and to avoid any deceptive, misleading or unethical practice or advertising that is or might be detrimental to plaintiff, Michelin products, other authorized Michelin dealers or the public. [3]

(d) Plaintiff agrees to make reasonable efforts to fill the orders of the dealers that are accepted by plaintiff, but plaintiff contracts that it shall not be liable for failure to ship or for delay in shipment of Michelin products where such failure or delay shall have been due wholly or partly to shortage or curtailment of material, labor, transportation or utility

services, or to any labor or production difficulty in the plants of its suppliers, or to any cause beyond plaintiff's control or without plaintiff's fault or negligence.

(e) Plaintiff notifies its dealers of the prices of Michelin products that plaintiff will charge them. The dealers are required to pay plaintiff the dealer price and, if not included in such price, a charge equivalent to or in reimbursement of all applicable taxes on the manufacture, distribution, ownership, use or sale of the Michelin products. They are also required to pay to plaintiff any charges for the transportation of Michelin products as may be specified in plaintiff's price lists, schedules or programs. Plaintiff reserves the right to change at any time and from time to time, without prior notice, the dealer price of any Michelin product. Except as otherwise specified in writing by plaintiff, the price is the price in effect. The delivery is deemed to have been made and the order deemed filled on the date of delivery to the carrier or the dealers, whichever occurs first. In the event that plaintiff increases the price for any Michelin product, the dealers have the right to cancel any orders for such product placed with plaintiff prior to receipt of notice of such increase and unfilled at the time of receipt by plaintiff of notice of cancellation.

(f) Payment of Michelin products purchased by the dealers is required to be made when the Michelin products are placed in delivery to the dealers in accordance with the terms of plaintiff's invoice or in such other manner as plaintiff may prescribe.

(g) Notwithstanding shipment, delivery, acceptance, or risk of loss and damage, the title to each Michelin product remains with plaintiff until payment for such product is actually received by plaintiff. [4]

7. There are retail sales through plaintiff's national account department in which a national account cus-

tomer picks up tires through plaintiff's dealer system from plaintiff's warehouse facility in Overland Park, Kansas, and is billed by plaintiff for such pick-ups. There are also retail sales to employees at plaintiff's warehouse in Overland Park, Kansas.

8. Plaintiff's establishment at 9100 Quivira in Overland Park, Kansas, is a branch operation which services a geographical area which includes Kansas, Missouri, Iowa, North Dakota, South Dakota, parts of Oklahoma and Memphis, Tennessee. The branch operation distributes tires to various dealers in this area. The facility consists of a one-story brick and cinder block building with approximately 42,000 or 43,000 squre feet of storage space. There is office space in the building which is occupied by a technical representative, a leasing representative, the local sales representative and the district sales manager. The branch distribution manager and the assistant internal sales representative occupy office space in the general office area. Approximately seventeen people use or work in the facility. There is an advertising display in the doorway which describes the function of a radial tire, plaintiff's progress along those lines as the company developed and Michelin stands for.

9. The merchandise kept in the Johnson County facility consists basically of tires, tubes and flaps. A flap is a doughnut-shaped object that is a protective device inserted between the rim and the tire and tube to prevent the rim from rubbing into the tube and causing a blow-out.

(a) A record of the inventory on hand is maintained in a Kardex record keeping system. The minimum amount of any particular item required to be kept on hand is determined by the amount of sales

and fluctuates with sales. If plaintiff is not selling very much of a particular item, plaintiff does not order much of it to store. The director of distribution in New York is responsible for the determination as to the minimum amount of any particular merchandise during any given period of time. Both the distribution department in New York and the factory give the branch operations manager advance notice of what they are shipping to the Johnson County facility. [5]

(b) When merchandise arrives, it is recorded in the Kardex. All of the merchandise is manufactured outside of the United States and arrives from overseas or from Canada at the Johnson County facility in sealed containers or sea vans. They range in size from 20 to 30 feet long to 40 to 45 feet long. The merchandise is loaded into the vans or containers at the point of departure and remains in the same until it is opened by plaintiff at the Johnson County facility. The containers are transported from Canada or, after arriving by ship at Houston, Texas, from overseas, by rail.

(c) The containers or vans which arrive at plaintiff's Johnson County facility are sealed. The first thing that plaintiff does is to break the seal. The seal is a self-locking device and has to be cut. The purpose of the seal is to insure that the container has not been tampered with. After the seal is broken, the container or van is opened and is backed up to the warehouse door and unloaded.

(d) The tires are just lying or are stacked inside. Sometimes the flaps arrive loose in bundles, but the majority of the times they arrive inside the tire itself. The tubes arrive packaged in boxes. Each individual tire is in a small carton which, in turn, is in a larger carton. If plaintiff packages more than one tire, it could be like six, seven or eight tubes in their individual wrappings which are then put in a larger box.

At times, the larger boxes are broken down before they leave the premises.

(e) Generally, the tires are s! ipped to dealers, associate dealers, to other warehouses for stock transfers or to original equipment manufacturing accounts.

(f) Plaintiff's employees unload the container and place the product on pallets, which are wooden platforms used for storage.

(g) Depending upon the space available, there is a particular location for each type of merchandise, with a certain type of tire in one area, a different type of tire in another area, tubes in yet another area, etc. The foreman [6] makes the determination as to where the particular product will be stored.

(h) Orders are received by mail and by telephone. After the order is received, it goes to an employee of plaintiff who operates the Kardex on plaintiff's inventory and the order is subtracted from plaintiff's inventory at that time. From there, the order goes to another one of plaintiff's employees who types a bill of lading for the items on the sales order. The bill of lading is a shipping document pursuant to which plaintiff's employees pull the order according to the sizes, descriptions and amounts and which they use to ship tires out of the warehouse. After the bill of lading is typed, it is forwarded to plaintiff's warehouse foreman who assigns the men to pull the order and contact the truck line indicated on the bill of lading and request that the shipment be picked up.

10. The District Manager, whose office is in the Johnson County facility, is primarily concerned with sales. His functions basically consist of sales, collection of money for items sold and training men. His immediate supervisor is the vice-president of sales in New York. His district includes Missouri, excluding St.

Louis; Kansas; the southern half of Iowa; and Nebraska, excluding four or five counties.

(a) The salesmen call upon dealers who have entered into written dealer-sales agreements with plaintiff for the sale of Michelin products. Formerly, such dealers were authorized to appoint associate dealers whom plaintiff recognized as points of sale for Michelin. However, commencing with September of 1973, the said dealer-sales agreements eliminated that practice. Prior to September, 1973, plaintiff acknowledged such appointments. Since then, plaintiff does not acknowledge them, but those appointments in existence prior to September, 1973, have for the most part been maintained. Recognition by plaintiff involved the development by plaintiff of a dealer directory book showing the points of sale which would include such associate dealers. Prior to September of 1973, it was fairly routine for deliveries to be made by plaintiff to the associate dealers. [7]

(b) The sales staff regularly calls, ordinarily in person, upon the dealers. If there are any of the outstanding old contracts, they might occasionally call upon an associate dealer in the company of the dealer. The sales staff promotes the sale of Michelin products to the regular dealers and whenever possible assists such dealers in promoting their sale of those products to consumers in the community in which the dealers operate.

(c) In connection with the function of selling Michelin products to the dealers and in connection with the function of assisting the dealers in selling to their consumers, the sales staff utilizes advertising and promotional materials such as pamphlets, catalogs and directories. Occasional dealers may request promotional materials from the sales staff in which case the sales staff sees to it that the material is furnished to the dealer. Another service performed

by the sales staff is assisting the dealers with the paper work or billing if they have a problem.

(d) In those instances in which a representative of the sales staff accompanies one of plaintiff's regular dealers to talk to a consumer or some other dealer, he explains the kind of tire, the quality, the prices, etc., and assists them with promotional material, if requested. There are fifty-two dealers in this district. These would not include any associate dealers left over from the prior practice. There are twenty-one dealers in the state of Kansas. The dealer places the order with the plaintiff and it is the job of the branch operations manager to find the tires. The sales staff has nothing to do with warehousing. There is a telephone order form, which is filled out by an employee of plaintiff at the warehouse in Johnson County based upon information transmitted by telephone. Order forms provided to the sales staff are used for taking orders for Michelin Tires from the dealers. One is for truck tire orders and the other is for passenger and like commercial tires. [8]

(e) When orders are taken, the salesmen either mail the order in or phone the order in depending on how badly they need the merchandise. If the order should be called in, an employee would fill out a copy of a telephone order form. Orders on copies of order forms are usually mailed to the installation at 9101 Quivira Road in Johnson County. There are three copies of each form: One labeled Michelin warehouse copy, one labeled Michelin dealer copy and one labeled Michelin salesman's copy. The Michelin warehouse copy is mailed in. This would more than likely be directed to the Assistant District Manager at 9101 Quivira Road, Overland Park, Kansas, who, in the ordinary course of business, would be the person to receive the forms as they are mailed in. He gives them to the girls who work in the warehouse section. The dealers are required to and do pick up the tires

at the Johnson County facility.

(f) It is the responsibility of the District Manager, through plaintiff's credit department in New York, to get the money for the merchandise that he sells. The dealers send the money directly to New York. If the dealers don't send in the money, the credit manager of plaintiff in New York contacts the District Manager and advises him that they need the money. The District Manager then goes to the dealer and attempts to collect the money. The money is then sent to the New York office.

11. The local Michelin territorial representative has a geographical area encompassing the Greater Kansas City area and St. Joseph, together with four counties around that area in Missouri and the state of Kansas west to a line west of Topeka, Kansas. His immediate supervisor is the District Manager. His job as territory representative is primarily to call on the dealers; to train their personnel; to sell with their personnel; to take care of all credit problems that they may have; and to solicit new distribution as far as new dealers go. He furnishes the dealers advertising or promotional material in connection with Michelin tires and equipment. Most of the advertising and promotional material comes from New York.

(a) The local territorial representative has an office in the building at 9101 Quivira Road, Overland Park, [9] Kansas. He is in the office possibly one day a week and is in the field during the rest of the week contacting dealers. He transmits written orders either to the Assistant District Manager or to one of the girls who work in the warehouse function of the operation. The orders are then filled at the warehouse which is located in the same building or from another warehouse, in which they use the TWX machine, if the local warehouse runs out and doesn't have an item in stock. However, if the ordered item is in

stock, it would be filled from the stock on hand. The merchandise is either picked up by the dealer himself or shipped by plaintiff to him by common carrier. The girls in the office make arrangements for the shipments by common carrier.

12. A leasing representative of plaintiff maintains an office in plaintiff's building at 9101 Quirira Road, Overland Park, Kansas. Tires are leased. The job title of the representative is Service Supervisor for the Leasing Department of plaintiff for the Midwest. His immediate supervisor is the Manager of the Leasing Department at Lake Success, New York where the company headquarters is located. He has Michelin employees who do work under him who service the lease accounts. He is involved with leasing tires to bus companies on a fleet basis. His geographical area includes Chicago, Illinois; St. Louis, Missouri; Minneapolis, Minnesota; Omaha, Nebraska; Kansas City, Missouri; and Wichita, Kansas. The service involves changing bus tires off and on busses, mounting tires, repairing and re-grooving. The frequency of his visits vary. He has only been to Wichita once since he has been in this division. He communicates by letter and telephone from time to time on an irregular basis with the account in Wichita.

(a) If one were to go out and seek to promote new accounts, it would be a sales representative who inadvertently came across someone who would be apt to lease tires rather than to buy tires. It would be just a lead; the agreements are negotiated with the leasing department in New York.

13. One small area of warehouse is used for plaintiff's tire inspector who examines Michelin tires that have been under warranty and returned by dealers. His immediate supervisor is [10] a department manager

in the technical department in plaintiff's New York office.

14. A field engineer employed by plaintiff maintains an office in plaintiff's building at 9101 Quivira Road. He uses a pool secretary who is shared with the sales department, the distribution department and the leasing department. He receives his work assignments from one of the several department managers within the technical department in the plaintiff's New York office. Such as the earthmover tire product engineer manager, truck and car passenger tire manager and the man in charge of plaintiff's tire evaluation program. The field engineer works at the request of the district sales manager.

(a) It would not be unusual for a field engineer to receive a direct call from a district manager about a problem. However, before the field engineer could work on it, the district manager or the field engineer would contact plaintiff's technical department in New York which would then clear the field engineer to do it.

(b) The field engineer is concerned with product evaluation for various types of vehicle application, primarily with earthmoving tires, and he works with the mining and construction industries. He is also responsible for establishing vehicle conditions of use through survey studies. He becomes involved with persons in the sales department when a problem or alleged problem occurs resulting from misapplication of the Michelin tire or from tire abuse. They have a responsibility to keep the district sales manager, in whose district they are concerned with product evaluation aware of what they are doing.

(c) The local installation is not an earthmoving warehouse, but on occasion tires will be processed through it for an o.e.m. manufacturer, that is for

original equipment mounting. For example Isco manufactures earthmovers in Kansas City and on occasion there have been some tires stored here that are destined to go to Isco.

(d) On occasion, the field engineer gets involved in the evaluation of the various types of truck tires. These are the types of truck tires that you would ordinarily [11] find in the local Michelin warehouse. His program of product evaluation is not solely a function of gathering data but actually includes assisting people in learning how to make maximum use of Michelin products. When this occurs, it will be set up by plaintiff's sales representative or by direct contact with the man who is using the product. This is a kind of service function in the sense of providing technical information to the owner of an item in order for him to make good use of the Michelin product and to create customer satisfaction.

(e) They gather data on how the tires are performing and the information is relayed to plaintiff's New York office.

(f) If there is a claimed failure of a product, it is a matter of making an inspection of the tire. On occasion, he is contacted directly by the customer or owner of the tire or by the sales manager. He has some routine visits for the purpose of making tire inspections which are not activated by the New York office.

(g) Basically, the field engineer's function falls into two areas; going out and working with the tire owner to enable him to make the maximum use of what the tire is capable of doing, and, in the event of a claimed product failure, going out and making his own investigation and analysis of what happened.

15. Plaintiff's facility in Johnson County, Kansas, is not a bonded and licensed warehouse nor are records maintained by plaintiff, with reference thereto, all in

accordance with K.S.A. 79-304.

16. Plaintiff's warehouse is registered in Kansas as a retailer and collects and remits Kansas sales tax.

17. When plaintiff made application for authority to engage in business in the state of Kansas as a foreign corporation, it submitted a statement that the full nature and character of the business in which plaintiff proposed to engage within the state of Kansas was leasing a warehouse for the purpose of maintaining a stock of tires and selling its tires within the state, and generally carrying out its corporate purposes within the state. [12]

Rationale of Memorandum Decision

This is a suit to cause refund of an ad volorem [sic] tax imposed on tires, tubes, and flaps which are stored in plaintiff's Johnson County, Kansas warehouse. That warehouse is a storage center for imported articles to be distributed to a multistate area. The articles are imported to the United States in sea vans. Upon arrival at the Johnson County warehouse, the tires, tubes, and flaps are removed from the van, sorted, stacked, and commingled with existing inventory.

Plaintiff contends that the tax is in violation of the United States Constitution, Article 1, Section 10, Clause 2, which provides:

> No state shall, without the consent of Congress, lay any Impost or Duty on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws.

Plaintiff also states that the "Original Package Doctrine" of *Brown v. Maryland*, 25 U.S. 419 (1827), is a clear prohibition to imposition of this tax.

Defendant's contention is that the "Original Package Doctrine" is not applicable to this tax, and that if it were, plaintiff has removed the articles from their original package.

The Court must decide whether the importer has acted upon the tires, tubes, and flaps so as to cause them to be mixed up with the mass of property in the country and to lose their distinctive character as imports. *Brown v. Maryland*, supra; *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1958). When imported goods are used for the purpose for which they

— not used —

[13] are imported, they cease to be imports and their tax exemption is at an end. *Hooven & A. Co. v. Evatt*, 324 U.S. 652 (1944).

Chief Justice Marshall was the first to present a composite view of the requirement of Article 1, Section 10, Clause 2, which prohibits state taxation of imports. In *Brown v. Maryland* supra, the Court held that one who had imported goods for the purpose of selling them had by payment of the duty to the United States, acquired the right to dispose of his merchandise, as well as bring it into the country, and that the state cannot tax it while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported. This was the beginning of the "Original Package Doctrine" which has caused much difficulty to the courts of this nation. While plaintiff contends that the doctrine is absolute, Chief Justice Marshall made clear that "there must be a point of time when the prohibition ceases, and the power of the State to tax commences." *Brown v. Maryland*, supra, 12 Wheat at 441. Marshall did not make

the distinction in *Brown*, for there it was unnecessary, but he did state: ". . . the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application." *Brown v. Maryland*, supra, at 441, 442.

The United States Supreme Court has developed a number of tests to determine when a state has infringed upon a federal power designed to protect the non-importing states from discrimination by importing states. This Court is forced to examine each of the rules, determine their applicability to the present situation, and on this basis make a decision. Parties to this suit have entered into a stipulation of facts which the court considered in its decision together with all pleadings, briefs, and memorandums of counsel.

I. The Original Package Doctrine.

This case is demonstrative of the difficulty which courts have in construction of the "Original Package Doctrine" established in *Brown v. Maryland*, supra. To apply the test here, [14] it is essential to determine what the original package is. There are three possibilities: The sea vans, the group of goods, and the single items, (that is, each tire, tube, and flap as a single original package).

If the sea vans are the original package, it is clear that once the items were removed and commingled, the original package was broken. Plaintiff contends that the sea vans are not the original package but a transportation device. Plaintiff's citation to the Code of Federal Regulations 49 C.F.R. 420, 19 C.F.R. 10.41 does not establish any criterion for the constitutional

"original package". In *F. May & Co. v. City of New Orleans*, 178 U.S. 496, 509 (1909) the United States Supreme Court directly addressed the question of whether shipment packages were the original package:

> In our judgment, the original package in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for sale or delivery of separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits.

Logically, a package may be employed both as a means of shipment and storage. Here the ship was the primary means of transport, the van was a means of storage. It seems clear that *Brown*, supra, as well as *Youngstown*, supra, contemplate the package to be the one to which the customs seal of the United States was attached. From the material submitted by plaintiff it is clear that the total value of the shipment was the basis for the duty, and each van had a custom's seal attached to it. However when the vans reached the Johnson County warehouse, the seal was broken and the items removed. This is strong evidence that the original package was violated. Plaintiff's citation of *Leather's Best, Inc. v. S. S. Mormaclynx*, 313 F.S. 1373 (E.D.N.Y. 1970) and *Michigan State Tax Commission v. Garment Corp. of America*, 32 Mich. App. 715 (1971) are not persuasive. In the latter case, the goods were grouped inside the van into characteristic original packages, and that is not the case here. [15]

A second possibility is when the items were grouped into original groupings inside the sea van. In cases where it is impossible or unreasonable to package the goods, the aggregation of articles imported may con-

stitute the original package. See *Volkswagen Pacific, Inc. v. City of Los Angeles*, 496 P.2d. 1237 (1972); *E. J. Stanton and Sons v. Los Angeles County*, 177 P.2d. 804 (Calif. App., 1947). Similar cases are found in *Hooven & Allision Co. v. Evatt*, 324 U.S. 652 (1944). In that case the Court held that fiber bales imported into the United States for manufacture retain character as an import "while remaining the property of the importer, in the original form or package in which it was imported." (324 U.S. at 655). In this case this property was commingled with the other property in the same warehouse and employed as needed to satisfy supply requirements. Thus, the case is more like *Youngstown Sheet and Tube v. Bowers*, supra. There the Court held that "piles" of ore in "stock bins" had been sufficiently commingled with other supplies as to lose their character as imports. The Court holds that, when the items in the aggregation are separated into separate classifications and made available for use, it is, per se, a violation of the original package. Therefore, plaintiff is not saved by this second criterion.

Plaintiff submits that each tire, tube and flap is an original package because each tire can be distinguished from any other item because it is serialized. *Florida Greenheart Corp. v. Gautier*, 172 So.2d. 589 (1965) is cited by plaintiff to support his contention. In that case the individual nature of the item was incidental. The issue was whether the item when offered for sale lost immunity from taxation. It was held in *Hinson v. Lott*, 75 U.S. 148 (1827):

> . . . in discussing the landmark case *Brown v. State of Maryland* (supra) . . . (the United States Supreme Court) said with regard to foreign imports in the hands of the importer: "*** as soon as they passed out of his hands into use, or were offered

> for sale among the community at large, they would be liable to a tax." [16]

Youngstown Sheet & Tube Co. v. Bowers, supra, has the same effect. Thus, assuming arguendo, that plaintiff is correct that each item is an original package, plaintiff must pay the tax because it has both commingled the property and allowed it to come within the general mass of property within the state. Thus, the holdings of *Department of Revenue v. James B. Beam Distilling Company*, 377 U.S. 341 (1964) is not applicable. In that case, the original packages, containing more than one unit, remained in the hands of the importer prior to use, sale, or offering for sale, and were immune from tax. This is not the case here. Plaintiff offered items for sale to employees and national account customers without distinguishing inventories.

Therefore, the Court specifically determines that the tires, tubes, and flaps are not original packages. Inventory accounting by use of serial numbers on each tire to maintain segregation is non-evident, and there is no indication of serialization of tubes or flaps. To hold otherwise would open the door to continuous breakdown of original packages after importation thus allowing each original package to generate many "original packages"; this result would be untenable.

Under the "Original Package Doctrine" the result from analysis of the contentions of the plaintiff is the same. Plaintiff has both broken the original package and commingled the goods with the mass of property in the state.

II. Incorporation of Imports Into Mass of Property

In 1934 the United States Supreme Court decided *Baldwin v. Seelig*, 294 U.S. 511 (1934), which this Court

recognizes was an interstate commerce case rather than a foreign commerce case. In that case, Mr. Justice Cardozo writing for the Court said:

> The test of the original package which came into our law with *Brown v. Maryland*, supra, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries * * * the original package is not the ultimate principle. It is an [17] illustration of a principle . . . It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. (294 U.S. 526, 27)

Initially, the Court made a distinction to the above formula in cases dealing with foreign commerce. There the important consideration was maintaining the exclusive power of federal taxation on imports.

Today, the "Original Package Doctrine" in importation cases is recognized to be the same test as applied in *Baldwin v. Seelig*, 294 U.S. 511 (1934). As the Court said in *Youngstown Sheet & Tube Company v. Bowers*, supra at 548:

> Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them "to the use for which they were imported."

Plaintiff attempts to distinguish *Youngstown* on the basis that in that case, the goods were imported for use and not sale. In view of *Hinson v. Lott*, supra, and *F. May and Co. v. New Orleans*, supra, that distinction

seems meaningless. Justice Marshall did not make this distinction in *Brown v. Maryland*, supra. He recognized an exception when the importer sells the goods or breaks up his packages and travels with them as an itinerate "peddlar." Justice Whittaker writing for the Court in *Youngstown* adopted the *Brown v. Maryland* rule as stating that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has lost its distinctive character as an import, and has become subject to the taxing power of the State. It is interesting to note that this case is distinguishable from *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1932) at 225 and other cases of similar holding in that in those cases the goods were not in any manner commingled with and did not become a part of the general mass of property in the country. In *Youngstown*, the activity of the importer which subjected the [18] import to the tax was the placement of the materials in "piles" in "stock bins" as a storage device thereafter feeding the materials into the factory furnaces, as the daily needs of the factory required.

Plaintiff maintains his warehouse in a similar manner. Goods are segregated into "stacks" or "piles" upon wooden pallets in plaintiff's warehouse. As required, the tires, tubes, and flaps are distributed from the common mass to their retail customers and dealers within and without the state. Without any segregation plaintiff also makes distribution to both "national accounts" and employees from the general stock of the warehouse. There is no segregation of the mass of goods which have come to rest in Kansas and those

which plaintiff contends are still in interstate commerce. See *Youngstown*, supra.

Removal of the tires from the vans and sorting and stocking them caused the aggregate to be broken up. For legal purposes, this constituted a breaking of the original package and the ad valorem tax was properly applied.

Plaintiff further acted to destroy the tax immune status of the tires by putting them to the use for which they were imported in such a way as to comingle them with the mass of property in the state. By placing the tires in inventory with its other property, Michelin caused the tires to lose their identity as imports.

Hooven and Allison v. Evatt, 324 U.S. 652 (1945), and *Youngstown Sheet and Tube Co. v. Bowers*, supra, clearly established the "put to use" rule with regard to imports. ". . . goods brought into this country by an importer 'for his own use' and here 'used' by him are to be regarded as part of the 'common mass' of property and are not immune from state taxation." *Youngstown Sheet and Tube Co. v. Bowers*, supra. Likewise in accord are *American Mennex Corp., v. Cronvich*, 207 So2d 778 (la. 1968); *Volkswagen Pacific, Inc.*, supra; and *E. J. Stanton and Sons*, supra.

Of great importance is a decision handed down by the Supreme Court of Georgia on February 4, 1975. *Wages, Comr., et al. v. Michelin Tire Corp.* was a factual situation quite similar to the instant case with regard to the imported tires. The court ruled that:

> . . . the entire Michelin tire inventory was unpackaged, and all shipments in the inventory were commingled and stored by sized and type to make the individual units immediately available for resale. We therefore hold that the tires, imported

> in bulk without packaging, which have been sorted, segregated by size and style and commingled with other shipments have lost their status as 'imports' and are subject to taxation.

The Court determines that plaintiff, in making distribution of goods to customers from a common mass which has lost its character of an original package in interstate commerce, is not entitled to an exemption from taxation upon the basis of Article I, Section 10, Clause 2 of the United States Constitution.

It is therefore considered, ordered and adjudged that plaintiff take naught and that the costs of this action be and they are hereby taxed to the plaintiff.

The Clerk of the Court is directed to enter the judgment herein announced of record as of this date and it shall be effective as of this first day of July, 1975.

/s/ HAROLD R. RIGGS

HAROLD R. RIGGS
District Judge, Div. 4

[20]